IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.458 OF 2006

Madhukar Mahadeo Fartade ...Appellant

Vs.

Ramchandra @ Pandit Shridhar
Kulkarni and another ...Respondents

Mr.K.S.Dewal for the Appellant
Mr.G.S.Godbole for the Respondent No.1.

CORAM: A.S.OKA, J.
DATED: MAY 5,2006.

P.C.:

1. Heard the learned Advocates appearing for the Appellant and the Advocate for the Respondent No.1. The Second Appeal is admitted on the following substantial question of law :

. "Whether the Appellate Court could have set aside the decree passed by the Trial Court without specifically upsetting the finding of the Trial Court that the suit was barred by limitation ?"

2. The Advocate for Respondent No.1 waives service. It is not in dispute that the Respondent No.2 has supported the Appellant and therefore service of notice to the Respondent No.2 is dispensed with. Taken up forthwith for final hearing.

3. The Appellant is the original Defendant No.2. The suit filed for declaration and for possession by the Respondent No.1 was dismissed by the Trial Court. One of the grounds on which the suit was dismissed was that the suit was barred by limitation. The learned Trial Judge held that the suit was barred by limitation. In an Appeal preferred by the Respondent No.1, the District Court has interfered and has passed a decree for declaration and possession.

4. After having heard the submissions of the learned Advocate for the Appellant and the Advocate for the Respondent No.1, I find that the Appellate Court has not at all framed a point for determination as regards limitation. The Appellate Court has not set aside the finding of the Trial Court on the issue No.10 regarding limitation. If the Trial Court held that the suit filed by the Respondent No.1 was barred by limitation, the Appellate Court could not have set aside the decree passed by the Trial Court without recording a finding on the issue of limitation in favour of the Respondent No.1-Plaintiff. In view of the section 3 of the Limitation Act, 1963, the Appellate Court ought to have framed a point for determination on limitation and ought to have decided the same. Only on this ground, the decree passed by the Appellate Court deserves to be set aside and the Appeal deserves to be remanded back to the District Court.

5. Hence, I pass the following order :

i) Impugned Judgment and Order dated 23rd February 2006 is quashed and set aside and Civil Appeal No.493 of 2001 is restored to file.

ii) Parties are directed to appear before the learned District Judge, Solapur on 17th July 2006 at 11.00 a.m. for fixing the schedule of hearing.

iii) The learned District Judge will decide the Civil Appeal No.493 of 2001 afresh in the light of the observations made in this Judgement as expeditiously as possible and preferably before the end of February 2007.

iv) All contentions of the parties on issues arising in the Appeal are kept open.

v) The Second Appeal is partly allowed in above terms with no order as to costs.

v) Parties and the concerned Court to act upon an authenticated copy of this order.

Judge.